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77-2682

LETTER TO HEADS OF ALL FEDERAL DEPARTMENTS AND AGENCIES

Re: Freedom of Information Act

I am writing in a matter of great mutual concern to seek your cooperation.

Freedom of Information Act litigation has increased in recent years to the point where there are over 600 cases now pending in federal courts. The actual cases represent only the "tip of the iceberg" and reflect a much larger volume of administrative disputes over access to documents. I am convinced that we should jointly seek to reduce these disputes through concerted action to impress upon all levels of government the requirements, and the spirit, of the Freedom of Information Act. The government should not withhold documents unless it is important to the public interest to do so, even if there is some arguable legal basis for the withholding. In order to implement this view, the Justice Department will defend Freedom of Information Act suits only when disclosure is demonstrably harmful, even if the documents technically fall within the exemptions in the Act. Let me assure you that we will certainly counsel and consult with your personnel in making the decision whether to defend. To perform our job adequately, however, we need full access to documents that you desire to withhold, as well as the earliest possible response to our information requests. In the past, we have often filed answers in court without having an adequate exchange with the agencies over the reasons and necessity for the withholding. I hope that this will not occur in the future.

In addition to setting these guidelines, I have requested Barbara Allen Babcock, Assistant Attorney General for the Civil Division, to conduct a review of all pending Freedom of Information Act litigation being handled by the Division. One result of that review may be to determine that litigation against your agency should no longer be continued and that information previously withheld should be released. In that event, I request that you ensure that your personnel work cooperatively with the Civil Division to bring the litigation to an end.

Please refer to 28 CFR 50.9 and accompanying March 9, 1976 memorandum from the Deputy Attorney General. These documents remain in effect, but the following new and additional elements are hereby prescribed:

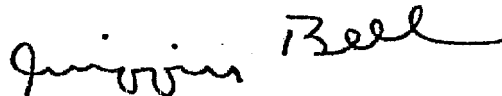
In determining whether a suit against an agency under the Act challenging its denial of access to requested records merits defense, consideration shall be given to four criteria:

- (a) Whether the agency's denial seems to have a substantial legal basis,
- (b) Whether defense of the agency's denial involves an acceptable risk of adverse impact on other agencies,
- (c) Whether there is a sufficient prospect of actual harm to legitimate public or private interests if access to the requested records were to be granted to justify the defense of the suit, and
- (d) Whether there is sufficient information about the controversy to support a reasonable judgment that the agency's denial merits defense under the three preceding criteria.

The criteria set forth above shall be considered both by the Freedom of Information Committee and by the litigating divisions. The Committee shall, so far as practical, employ such criteria in its consultations with agencies prior to litigation and in its review of complaints thereafter. The litigating divisions shall promptly and independently consider these factors as to each suit filed.

Together I hope that we can enhance the spirit, appearance and reality of open government.

Yours sincerely,



Griffin B. Bell
Attorney General

THE DEPUTY ATTORNEY GENERAL

WASHINGTON, D.C. 20530

March 9, 1976

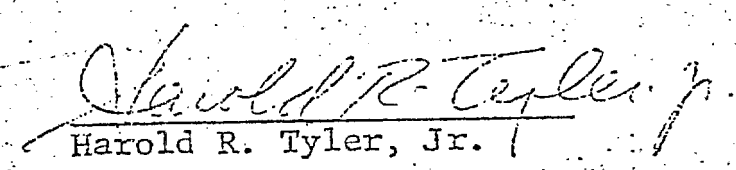
MEMORANDUM TO GENERAL COUNSELS OF
ALL FEDERAL DEPARTMENTS AND AGENCIES

Re: Freedom of Information Committee

The purposes of this memorandum are (1) to bring to your attention an order of Attorney General Levi dated March 2, 1976 revising this Department's policy regulation on the above matter, and (2) to furnish you with certain additional information on this subject.

As the attached copy of the Attorney General's order indicates, agencies should continue to consult the Freedom of Information Committee as soon as they tentatively decide to issue a final denial under the Freedom of Information Act. However, after litigation has begun, all agency contacts on the matter should be with the Civil Division or other component of the Justice Department responsible for defense of the suit.

You should be aware that, under the Department's internal procedures, the litigating division handling a Freedom of Information suit will promptly send a copy of the complaint to the Committee. The Committee will review the complaint, and may make a recommendation to the litigating division with respect to its disposition. Thus, failure of an agency to consult the Committee prior to litigation will not avoid Committee review of the matter. It is in the agency's interest, especially when planning a final denial involving a matter of substantial difficulty or magnitude, to undertake direct and timely consultation with the Committee.


Harold R. Tyler, Jr.

Attachment

Freedom of Information Act and the increased volume of Freedom of Information business sometimes render such prior consultation impracticable. The present revision of the Department's regulations is intended to preserve the system of consultation with the Freedom of Information Committee to the maximum extent feasible, while eliminating the now impracticable bar against defense of litigation where prior consultation has not occurred. Since the Freedom of Information Committee, consisting of representatives from both the Office of Legal Counsel and the Civil Division, will work in close cooperation with the Civil Division with respect to denials which have become the subject of litigation, it will continue to be both important and advantageous for agencies contemplating denials to seek the Committee's prior advice wherever possible.

By virtue of the authority vested in me by 28 U.S.C. 509, 510 and 5 U.S.C. 301, § 50.9 of part 50 of Chapter I of Title 28, Code of Federal Regulations, is revised to read as follows:

§ 50.9 The Freedom of Information Committee.

(a) A Freedom of Information Committee is established within the Department of Justice to encourage compliance with the Freedom of Information Act, 5 U.S.C. 552, throughout the Executive Branch. The Committee consists of attorneys designated by the Assistant Attorney General, Office of Legal Counsel, one of whom shall be designated chairman; and attorneys designated by the Assistant Attorney General, Civil Division. The Committee shall coordinate the annual report of the Attorney General required by 5 U.S.C. 552(d) and shall provide assistance and encouragement to Federal agencies in complying with the letter and spirit of the Freedom of Information Act through training of Federal personnel and consultation with agencies on particular matters arising under the Freedom of Information Act. In consulting with agencies proposing to issue final denials under the Act, the Committee shall, in addition to advising the agency with respect to legal issues, invite the attention of the agency to the range of public policies reflected in the Act, including the central policy of fullest responsible disclosure. The Committee may also undertake studies and make recommendations to carry out the intent of this subsection.

(b) All Federal agencies which intend to deny requests for records under the Freedom of Information Act should consult with the Freedom of Information Committee, to the fullest extent practicable, before litigation ensues. After litigation begins, all contacts regarding the matter should be with the Civil Division or other component of the Department of Justice responsible for defense of the suit.

Dated: March 2, 1976.

EDWARD H. LEVI,

Attorney General.

[FR Doc. 76-6815 Filed 3-9-76; 8:45 am]

**Title 28—Judicial Administration
CHAPTER I—DEPARTMENT OF JUSTICE**

[Order No. 643-76]

PART 50—STATEMENTS OF POLICY

Freedom of Information Committee

This order revises the Department of Justice policy with regard to the Freedom of Information Committee.

The previous regulations of the Department of Justice concerning advising with respect to the Freedom of Information Act contemplated regular consultation with the Department's Freedom of Information Committee prior to the issuance of a final denial by an agency. The stringent time limits established by the 1974 Amendments to the

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